FILED
MAR 1 1 1957
JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1956.

No. 738

LOUIS W. NATHAN, GAETANO ALVITI, FRANK C. TORNABENE, PATRICK J. KNIGHT, and JOSEPH A. GIRALAMO,

Petitioners,

vs.

THE UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

REPLY TO BRIEF FOR THE UNITED STATES IN OPPOSITION.

RICHARD E. GORMAN,
One North LaSalle Street,
Chicago 2, Illinois.

DANIEL P. WARD,
105 South LaSalle Street,
Chicago 3, Illinois
Attorneys for Petitioners.

The Scheffer Press, Inc.—ANdover 3-6850

IN THE

Supreme Court of the United States

OCTOBER TERM, 1956.

No. 738

LOUIS W. NATHAN, GAETANO ALVITI, FRANK C. TORNABENE, PATRICK J. KNIGHT, and JOSEPH A. GIRALAMO,

Petitioners,

vs.

THE UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

REPLY TO BRIEF FOR THE UNITED STATES IN OPPOSITION.

To the Honorable, The Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioners, Louis W. Nathan, Gaetano Alviti, Frank C. Tornabene, Patrick J. Knight, and Joseph A. Giralamo, respectfully ask leave to file this brief in reply to the brief for the United States in opposition to our petition for a writ of certiorari, which petition is now pending before this Court. This is done pursuant to Rule 24(4) of the Rules of this Court.

Our initial reaction to the brief of the Government herein was one of deep chagrin for we found that the

Government chose to answer our arguments by ignoring them. Upon further reflection, however, our sense of chagrin was replaced by a sense of professional sympathy for we believe without immodesty, the Government cannot successfully answer our contentions. We shall illustrate later herein wherein the Government ignores our argument.

1. We would note that at pages 1 and 2 the Government oversimplifies the questions presented. In fact, the Government says there is but one question presented. We differ sharply with this. We reiterate that the questions presented are: (1) Was it not reversible error for the Trial Court to refuse to instruct that under Section 241, Title 18, U.S.C., the jury must find that defendants had the intention to injure or oppress a citizen or citizens in the enjoyment of a federally protected right?; (2) Did not the Trial Court err in holding that the crime created by Section 241 is a general intent rather than a specific intent crime?' (3) Was it not error for the Court of Appeals to hold that conspiracy is a general intent and not a specific intent crime?; (4) Was it not reversible error for the Trial Court to instruct the jury that it might infer "with a reasonable degree of accuracy" one's intentions, that is, *guilt*, from circumstantial evidence.

2. Admittedly in rather disjointed manner, may we invite the Court to page 2 of the Government's brief which sets forth the statute concerned, namely, Section 241, Title 18, U.S.C. The statute condemns persons conspiring, that is, agreeing to injure, etc. a citizen in the free exercise of a federally protected right. We read the Government's brief in vain seeking for an explanation of how persons can conspire and agree to commit a crime without *intending* to commit the crime. At page 13 of our petition we said in part, "when persons agree to

commit a crime, logic compels the conclusion that they intend to commit the crime!" The Government in its brief studiously avoids the logic of this observation.

3. The Government does not appreciate and understand the difference between a general intent and a specific intent crime. Similarly, the Court of Appeals failed to understand such distinction. For example, the Court of Appeals in its opinion (page 5a of Appendix to our petition) states that the familiar rule that a man is assumed to intend the natural consequences of his conduct is germane in a consideration of the statute herein concerned. That so-called rule, of course, applies only to general intent crimes such as murder. It has no application to specific intent crimes such as larceny, assault with intent to rape, assault with intent to kill, or *conspiracy*.

Here we have a specific intent crime. It was necessary for conviction that the jury find that the defendants had the intention of injuring, etc. citizens in the free exercise or enjoyment of federally secured rights. The defendants were entitled to have the jury instructed as to that prerequisite for conviction. Denial of the instruction was reversible error. In brief, the defendants were entitled to an instruction that this was a specific intent crime.

4. At page 6 of its brief the Government indulges in what is patently a gratuitous assumption. The brief says that "the intention to stuff the boxes *necessarily* included, therefore, the intention to deprive each valid voter of his right to vote guaranteed by the Constitution." Obviously, this is an assumption and not a valid sequitur. The Court of Appeals in its opinion (page 5a of Appendix to our petition) acknowledged that it was likely that the defendants were motivated by hopes of financial gain and political preferment.

The Government then strangely cites *U.S.* v. *Mosley*, 238 U.S. 383; *U.S.* v. *Classic*, 313 U.S. 299; *U.S.* v. *Saylor*, 322 U.S. 385 in purported support of its so-called thesis. As we pointed out in our petition for rehearing in the Court of Appeals (Page 3) all of these cases went to the Supreme Court on the question of demurrers filed in the U. S. District Court. The holdings anent the sufficiency of the indictments concerned are obviously not germane to the issues herein concerned. They miss the mark! We cannot perceive them to be pertinent.

5. At page 5 of the Government's brief it is asserted that our specific intent argument is answered by *Screws* v. *United States*, 325 U.S. 91. It is not plain to us how a decision interpreting Section 242 of Title 18 answers an argument concerning the interpretation of Section 241, Title 18. Citation of the *Screws* case serves merely to obfuscate the issue now under consideration. The statute is different and apart. Parenthetically, it might be observed that if this Court in the *Screws* case held that the term "wilfully" in Section 242 created a specific intent crime, then *a fortiori* the term "conspire" in Section 241 creates a specific intent crime. Commenting again parenthetically, may we call the attention of the Court to page 7 of the Government's brief wherein they say we misapprehend the *Screws* ruling because we suggest at pages 9 and 10 of our petition that the *Screws* case requires the defendant to have personal knowledge that he is invading a federally protected right. We have prayerfully read pages 9 and 10 of our petition and we are unable to find any suggestion, even remotely implicit, to such effect. Our position is that the *Screws* case is not involved in a consideration of Section 241.

6. As we observed initially, the Government chose to answer our arguments by ignoring them but the rights of

citizens cannot be ignored. (In our petition we made no reference to the sentences imposed on the defendants. However, inasmuch as the Government at page 3 of its brief refers to such sentences as being for terms of five years, four and a half years, and four years, we do not feel it inappropriate, in view of the Government's ignoring our argument, to observe that the rights of men who receive such sentences cannot continue to be ignored.)

In its brief the Government avoids any mention of *United States* v. *Dennis*, 341 U.S. 494, which involved the conspiracy provisions of the Smith Act (pages 7, 8, 9 of our petition). At page 9 of our petition we noted that this Court made reference to the *Screws* case, a prosecution under Section 242, and *United States* v. *Williams*, 341 U.S. 97, a prosecution under Section 241. This Court said concerning both the *Screws* and *Williams* cases, that is, this Court said concerning *Section 241* and 242:

> "*In those cases, the Court required the Government to prove that the defendants intended to deprive the victim of a constitutional right.*" (Emphasis supplied.)

What is the answer of the Government to this? Its brief is silent. Similarly, the Government avoided mention of our citation of the article by Dean Albert Harno of the University of Illinois, School of Law, "Intent in Criminal Conspiracy," which appeared in 89 University of Pennsylvania Law Review 624. At pages 14 and 15 of our petition we extracted numerous observations from Dean Harno's article to the effect that conspiracy is a specific intent crime. May we reiterate but one:

> "That criminal conspiracy *must* involve a specific intent becomes apparent when the essential attributes of the crime are analyzed." (Emphasis supplied.)

At page 6 of its brief the Government seeks to distinguish so-called election cases under Section 241 from prosecutions involving other federally protected rights. It is absurd to state that a statute will require one type of intention for one character of offense under a given statute and another intention for a different character of offense under the same statute. We cannot comprehend the Government's reasoning in this respect. Also, so far as election cases are concerned, the Government ignores *U. S.* v. *Kantor, et al.*, 78 F. 2d 710, which is cited at page 12 of our petition. In that case, too, the defendants were charged with election frauds. The Court of Appeals for the Second Circuit unanimously reversed the conviction saying in part:

> "It is not every wrongful act, which alters the result of the election, which is distinguishable under this section of the statute. It must be some act *intended to prevent some citizen from exercising his constitutional rights.* (Citations omitted.) (Emphasis supplied.)

We submit that the Court of Appeals for the Second Circuit correctly interpreted Section 241 and that the Court of Appeals for the Seventh Circuit did not correctly construe the statute.

7. In our petition we urged that the Trial Court erred when it instructed the jury that it might infer with "a reasonable degree of accuracy" what another intended in doing or not doing certain things. Intention was the gist of this statutory offense. Thus, the jury were instructed that they might infer the guilt of the defendants "with a reasonable degree of accuracy" rather than beyond reasonable doubt. At pages 7 and 8 of its brief the Government blandly dismisses this argument saying it is without merit. The Government in explaining that

portion of the charge to the jury say that the Trial Court had reference merely to the fact that intent must be ascertained through consideration of circumstantial evidence. The Government does not explain now how the Solicitor General reasonably presumes to have known the mind of the Trial Court some 14 or 15 months ago. The Government's statement must be dismissed as a gratuitous assumption. The Court of Appeals in its opinion (page 13a of our petition) acknowledged that the instruction was erroneous but that it was not prejudicial. We submit that the Court of Appeals was engaging in speculation when it opined that the instruction was non-prejudicial. Offhand, there are no two more important trial considerations in a criminal case than presumption of innocence and proof beyond reasonable doubt. The Trial Court erred in instructing the jury in one of the most sensitive areas of a criminal prosecution. As we observed in our petition, if a court many times instructed a jury correctly concerning the presumption of innocence and once had instructed the jury that a defendant is to be presumed guilty, this would, barring the most extraordinary corrective statement by the court, be reversible error. Here there was no corrective statement or retraction of any kind by the Court. Defendants confronted with long prison terms should not be obliged to speculate whether an erroneous instruction had a prejudicial effect on the jury and resulted in their convictions.

8. Finally, may we call the attention of the Court to a printing erratum which appears at page 18 of our petition. At the bottom of the page we noted that the original decision of the Court of Appeals was unanimous and then we stated that the learned Chief Judge of the Court of Appeals later voted to allow our petition for rehearing. We stated that the order concerned appeared at page 15a of our Appendix. This should have been page 16a.

CONCLUSION.

For the reasons advanced in our petition for writ of certiorari and in consideration of this reply to the brief for the United States in opposition, the petition for writ of certiorari should be granted.

Respectfully submitted,

RICHARD E. GORMAN,
DANIEL P. WARD,
Attorneys for Petitioners.

FILED
APR 18 195
JOHN T. FEY, C

IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. 738

LOUIS W. NATHAN, GAETANO ALVITI, FRANK TORNABENE, PATRICK J. KNIGHT and JOSEPH A. GIRALAMO,
Petitioners,

v.

THE UNITED STATES OF AMERICA,
Respondent.

PETITION FOR REHEARING AND REVERSAL OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI

WILLIAM H. COLLINS,
844 Shoreham Building
Washington 5, D. C.
RICHARD E. GORMAN,
One North LaSalle Street,
Chicago 2, Illinois
DANIEL P. WARD,
105 South LaSalle Street,
Chicago 3, Illinois,
Attorneys for Petitioners

WILSON - EPES PRINTING CO. - RE 7-6002 - WASHINGTON 1, D. C.

INDEX

PAGE

Reasons For Petition For Rehearing 1, 2

Argument 2, 3, 4, 5

Conclusion 6

Certification 6

List of Authorities

Ellis v. U. S., 206 U.S. 246, 257 3

Nathan, et al v. U. S., 238 F.2d 401 ..... 1, 2

Screws v. U. S., 325 U.S. 91 ..... 3, 4

U. S. v. Classic, 313 U.S. 299 3

U. S. v. The Ohio Power Co., (No. 312 October Term) decided April 1, 1957 5